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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1075.

LESLIE D. STICKLER,
*Petitioner,*

vs.

DAN TEHAN,
Sheriff of Hamilton County, Ohio,
*Respondent.*

## PETITIONER'S REPLY BRIEF

**In Support of Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.**

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
1320 The Superior Building,
Cleveland, Ohio 44114,

EUGENE D. SMITH,
18 East Fourth Street,
Cincinnati, Ohio 45202,
*Counsel for Petitioner.*

JOHN M. WIDDER,
*Of Counsel.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Petitioner presents this reply to respondent's "reply (*sic*) to the petition for writ of certiorari" (A) to clarify a misleading statement of the case presented by respondent, and (B) to refute respondent's contention that this Court's previous denial of certiorari sought by petitioner to review the judgment of the Supreme Court of Ohio, as well as the decision of the court below, bar the granting of the petition presently before this Court.

### A. RESPONDENT'S STATEMENT OF THE CASE CLOUDS THE ISSUES.

It is evident from respondent's recital of the statement of the case that he persists in misconceiving the nature of the charges for which petitioner was tried and convicted. Although neither fraud nor embezzlement formed the basis of the charges against petitioner, respondent views

the trial as involving a charge of fraud perpetrated upon seven or more individuals by petitioner, who is also characterized as an embezzler. The fact is that petitioner was indicted and tried solely for having given two promissory notes, each in the amount of $6,000.00, to a single individual.

Moreover, it is clear that the "operation" attributed to petitioner by the respondent is irrelevant to the charges against him both as a matter of law, by virtue of the charges themselves, and factually, by reason of the admission of the prosecution's principal witness who testified that the repayment of his loan to petitioner was not contingent upon petitioner's success or failure in his use of the funds. R. 370a, R. 380a.

Respondent's silence in response to petitioner's assertion that his trial was infected by both pre-trial and trial publicity, by the biased rulings of the trial judge and the use of perjured testimony by the prosecution is eloquent proof of the bankruptcy of his position. Respondent's reliance, therefore, upon the showing of a scheme devised by petitioner to defraud certain individuals, merely serves as a desperate attempt to cloud the vital issues presented by this petition for certiorari.

## B. THE PRIOR DENIAL OF CERTIORARI IS NOT A BAR TO THE GRANT OF CERTIORARI IN THE INSTANT CASE.

Petitioner's prior petition for a writ of certiorari to review the decision of the Supreme Court of Ohio was denied on January 13, 1964. 375 U. S. 935, Mr. Justice Black dissenting. This Court has repeatedly held that the denial of certiorari "imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U. S. 482, 490 (1923); *Maryland v. Baltimore Radio Show*, 338

U. S. 912 (1950). And in *Davis v. Balkcom*, 369 U. S. 811 (1962), Chief Justice Warren, dissenting from the denial of certiorari in a state criminal case, noted that such a ruling "does not mean that this Court approves the decision below, nor * * * that the petitioner is necessarily precluded from obtaining relief in some other appropriate proceeding."

The "appropriate proceeding" referred to in *Davis v. Balkcom, supra*, is that which was employed in the instant case—and in all cases in which it is sought to test the validity of a conviction which the state refuses to recognize as having been obtained in violation of constitutional guarantees—an application to a federal court for a writ of habeas corpus. *Fay v. Noia*, 372 U. S. 391 (1963), has surely laid to rest any contrary view of the question.

In any event, comparison of the two petitions submitted to this Court by petitioner reveals that the questions presented in each are not the same and that the petition now under consideration is more compelling for the allowance of the writ. The earlier petition did not urge issues relating to (a) whether this Court should adopt the federal standard with regard to jury interrogation in view of the trial court's refusal to permit detailed interrogation of the jurors on voir dire to elicit the effect of the inflammatory and prejudicial publicity, (b) whether this Court should further adopt the federal rule with regard to sequestration of and instructions to jurors in state criminal proceedings in view of the trial court's failure to sequester or give appropriate instructions to the jurors as to their exposure to, or reliance upon, extrajudicial publicity prejudicial to the petitioner, and (c) whether the trial judge himself was so influenced by the publicity that his bias deprived petitioner of a fair trial.

Moreover, petitioner's former application for certiorari was presented prior to the decisions of this Court in *Estes v. Texas*, 381 U. S. 532 (1965), and *Sheppard v. Maxwell*, 384 U. S. 333 (1966), which materially altered the criteria for weighing the effect of the pre-trial and trial publicity in the determination of the constitutional validity of petitioner's trial.

In affirming the judgment of the district court, the court below stated that an impossible standard would be created if the trial court was required to interrogate the jury upon a showing of prejudicial publicity, and that, in any event, any adverse effect of such publicity is cured by proper instructions to the jury. Appendix, p. 6a. The court relied upon this Court's decision in *Delli Paoli v. United States*, 352 U. S. 232 (1957), in which the post-conspiracy confession of a co-conspirator which included a reference to a co-defendant was held admissible.

In *Delli Paoli*, however, the Court was not concerned with pervasive newspaper, radio and television coverage which permeated the community both prior to and during the trial. Nor were the jurors contaminated at the very outset of the trial. Moreover, in *Delli Paoli* the Court was satisfied that independent evidence established guilt and that the jury had been properly instructed as to the limited use for which the confession was received. In the case at bar, the jury was inadequately admonished throughout the trial,* and any instruction, no matter how commanding, even if given, could not have overcome the tidal wave of publicity to which the jurors had been subjected.

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* See petition for certiorari, pp. 39-43.

## CONCLUSION.

Substantial constitutional questions pertaining to the trial judge's responsibility toward the accused in notorious and highly publicized trials, as well as the prosecutor's use of perjured testimony, are presented by this case. This Court's prior denial of certiorari in nowise bars the allowance of certiorari to review the judgment of the court below.

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
EUGENE D. SMITH,
*Counsel for Petitioner.*

JOHN M. WIDDER,
*Of Counsel.*